HARVARD

LAW REVIEW.

VOL. XIX. MAY, 1906. NO. 7.

RAILWAY RATE REGULATION.

RAILWAY rate regulation is now the subject of a brilliant debate in the Senate, a debate largely confined to legal questions, chief of which is whether or not Congress can give a commission the power to make railroad rates without giving interested parties a day in court to determine whether such rates are legal and binding. Senators Spooner, Knox, Bailey, and Foraker have spoken with learning, clearness, and power. They all agree that the Hepburn Bill must be amended to give the courts an opportunity to review the rates made by the commission, or there is great danger that any legislation may be declared unconstitutional, on the ground that it provides for taking from an owner the income of his property by the mere fiat of a commission, without giving him any day in court, any "due process" of law, within the Constitution.

President Hadley, in his able discussion of the subject in the Boston Evening Transcript of April, 1905, touched upon the necessity of being conservative and remembering the rule "more haste, less speed" in legislation of this character. His conclusion was:

> "But while Congress could undoubtedly increase the powers of the Interstate Commerce Commission if it wanted to, and that without any serious financial damage to the railroads, it is improbable that such action would result in much good to the public."

More recently, President Hadley is reported to have taken substantially the same position, but to think that the public demand is such that some legislation must be enacted.

What are the points to be kept in mind in considering this subject?

1. Even the Interstate Commerce Commission concedes that our railroad rates are not too high; that this issue is "obsolete." From 1887 to the present time but few cases have been brought before the Commission on this subject, and in but a single instance has one of them been carried to the Supreme Court of the United States. Either the railroads have complied with the suggestions or decisions of the Commission, or the lower federal courts have compelled them so to do, or have overruled the Commission for its mistakes. It follows that neither producers nor consumers have any grievance here, because the rates in this country are so much lower than those in any other as to show that the utmost possible commercial freedom is advisable in dealing with railroads.

2. Our rate legislation grew out of unjust discriminations. The publicity given to railroad rates, contracts, and arrangements by the Interstate Commerce Act and the Elkins Law, making the shipper as well as the carrier guilty for violations of the Interstate Commerce Act, have largely ended such discriminations. Neither publicity nor an act like the Elkins Law can instantly end such abuses; but the experience of England shows that patience and a reasonable enforcement of our statutes will end unjust discriminations and preferences by rebates, or otherwise.

3. The Interstate Commerce Act should be amended so as to extend its provisions to all common carriers engaged in interstate commerce, and to all rates affecting interstate commerce, that thereby carriers and artifices that now escape the law may be made subject to its regulations. It should not be possible for manufacturing corporations to organize their switches into an independent railroad, get an unjust division of the rate with some railroad company, and then snap their fingers at rate regulation aimed to prevent unjust discrimination, thereby obtaining an undue preference or advantage over competitors. Nor should it be possible for independent car lines, or other common carriers, to make excessive charges for icing fruits or meats, or rendering other services to producers, and then to escape complaints because they claim they are not within the provisions of the law. All common carriers, or quasi common carriers, and all rates affecting interstate commerce, from the time it starts until it stops, should come within the provisions of the law.

4. The Commission having the power to require that the rates

shall be reasonable, and shall not unjustly discriminate or prefer one over another, and the Supreme Court so construing the law as to prevent the common carrier from getting any advantage to itself out of being a dealer in commodities, it follows that the law as it stands to-day, if enforced, will necessarily end in divorcing the carrier from all other business, so that further provisions upon this subject are unnecessary.

5. The Commission is a grand jury or district attorney to investigate, an executive to enforce the law, and is clothed with judicial functions in hearing and determining cases that come before it upon complaints. Because of these warring and opposing functions, which all writers have agreed for more than a century should not be united in the same body, the Commission should not be given the power to fix any rate without giving the courts the power to review the Commission's action. In the courts we object to trying a case before a petit jury composed of grand jurors who found the indictment, or before a judge who was the district attorney who procured the indictment, and in like manner interested parties should not be compelled to submit to a final decision by any body of men discharging different and opposing functions, as does the Interstate Commerce Commission. The natural zeal of honest men to find that their charges are well founded explains the numerous rulings of the Commission which have been overthrown by the courts because they have been unfounded in fact or law. If so able a Commission, after long experience, is so frequently overruled as ours has been, it must be apparent, unless the courts themselves are at fault in their decisions, that they should have the power to review the action of the Commission.

6. A review of the decisions of the courts shows that they have not been at fault in overruling the Commission. Of the cases coming before the Commission, but a very small percentage have come before the courts, because in the vast majority of the cases coming before the Commission the railroads have either easily shown they were not at fault or have submitted to the decision of the Commission without going to the courts. In the small percentage of cases which the railroads have taken to the courts because they were dissatisfied with the rulings of the Commission upon the facts or upon the law, they have usually succeeded, because the Commission has been in error. The courts have not laid down any new or startling doctrine in reaching their conclu-

sion, but instead have given the same construction to our Act given to similar provisions of their statute by the English courts; we having borrowed our Act largely from the English acts on the same subject. Where English decisions have not furnished the rule, because the question was an original one, the courts have examined the Act to see if it gave the Commission authority to do what it did. As the Commission is not a court, and due process of law, within the Constitutional Amendments, requires that every person shall have a legal day in court before his property, or the income of his property, can be taken from him, it must be clear that Congress cannot enact legislation that can deprive a person of that day in court without thereby showing such a plain intent to violate the Constitution itself as to require the courts to pronounce such legislation unconstitutional and void.

7. The silent attack upon our courts for merely discharging their constitutional duties is but a continuation of the affirmative and aggressive attack upon them in 1896 for doing the same thing. As our courts are the very safeguards of our institutions, all charges that they are owned by corporations, or that they must be ignored by the citizen who would obtain justice, are unfounded, or should be made the basis of an impeachment of the judge of whom they are true.

8. In the power to "regulate" interstate commerce Congress has no power to fix charges upon services or for materials. It only has the power to prevent unjust or illegal exactions or discriminations; hence it can give no greater power to the Commission.

An intelligent study of the problem of regulating railway rates cannot ignore the experience of England. In other European countries, so large a proportion of the railways are owned and operated by the nations, which rigorously regulate the rates upon those not so owned, and the circumstances and conditions are so dissimilar, that little light is obtained from their experience. In England, however, the railways are owned by corporations, as is the case in our own country. England was a country abundantly supplied with means of transportation by water at the time railways were introduced, and therefore railways had to win their freight traffic by competition with water carriers upon the seas and upon her inland rivers and canals. The dense population of England, and the enormous extent of her manufactures, enable a comparatively small number of miles of railroad to do an enormous passenger and freight business for one of the richest nations in the

world. The English Parliament and the English courts are hampered by no constitutional restrictions, and therefore each has free play to regulate railway rates to the fullest extent deemed compatible with the true interests of the nation, or justice to investors in railway stocks and securities. Under such circumstances, we would naturally expect to find that water competition, regulation of rates by the English Government, and a dense traffic on comparatively few miles of railroad, would all together result in lower freight rates and more satisfactory conditions to producers and consumers than those found in our own country. Does the experience of England indicate that it will be wise to give the largest possible powers to our Interstate Commerce Commission, that that Commission may, so far as possible, make railway rates on interstate commerce whenever complaint is made to it? Does the experience of England indicate that it would be wise to make our Interstate Commerce Commission as independent as possible of the courts, and any right of review by the courts, so far as that can be done under our Constitution? Let the facts touching England's experience with railway rate regulation be the answer to these questions, and a valuable object lesson in their consideration.

Our present Interstate Commerce Act was largely borrowed from England, and our Supreme Court has followed the decisions of the English courts in construing our Act, so far as those decisions were applicable. It must be clear, then, that we shall get an insight into our own problem by studying that of England. And we shall best study the English railway rate problem and experience by taking as our guide a gentleman who is as disinterested and high an authority in England upon this subject as is President Hadley in our own country; I mean Mr. Acworth, author of the "Elements of Railway Economics," the most informing work upon this subject that can be had in small compass, and a worthy companion to President Hadley's work on "Railroad Transportation."

Mr. Acworth, as a member of the International Railway Congress, happened to be in this country as a delegate for the British Government at the time the Interstate Commerce Committee of the Senate was engaged in its very thorough inquiry into this subject, and he gave the Committee a clear statement as to the legislation and experience of England. After reviewing the various English acts, he states the net result of them all to be:

1. A "statutory maximum, which, of course, is not really much of a check . . . ., is of no value except to local traffic for short distances and small amounts."

2. There shall be no "undue preference to one trader, or to one district, over another."

3. "The railway company must make no increase except for good cause, if anybody objects."

These results, added to rate publicity, have finally extinguished secret rebates in England, in the judgment of Mr. Acworth. It is noticeable, however, to quote Mr. Acworth, that under these acts "nobody has power to reduce a rate. The only thing they can do is to prevent a rate being increased."

Mr. Acworth's further discussion of this problem with the Committee was so candid, and is so informing, that I here quote from that discussion bodily two or three excerpts to show the judgment of an expert in England:

"THE CHAIRMAN. What, in your opinion, is the effect of governmental regulation of rates?

"MR. ACWORTH. In England I think there is no question whatever but that the enforcement of the law with respect to undue preference has tended to prevent concessions that would otherwise have been given. The railway people have been afraid that the courts would regard as similar, circumstances which they regarded as dissimilar, and therefore they have hesitated to make a reduction that they otherwise would have made, presumably with profit to themselves and to the traders. Whether the gain to the individual who is relieved, so to speak, from competition counterbalances the injury to the community from the keeping up of the average rate, I do not know. Since it has been decided that no rate can be put up once it has been put down, without appeal to the law courts, the railway companies have practically arrived at the conclusion that they will not put them down because they do not know whether they will have an opportunity to put them up again.

"SENATOR CULLOM. Do you think it works to the advantage of the people that the railways will not put the rates down for fear they will not get a chance to put them up again?

"MR. ACWORTH. Personally I have no doubt it does not. It is fair to remember always that it may protect the weaker in commercial strife. It is rather hard on the weaker man to be crowded to the wall by a wholesale concern in any walk of life. But if it be true in ordinary business that, on the whole, the public gains by the wholesaling method, it is probably true in railway business also. . . .

"THE CHAIRMAN. You think that dividing responsibility impairs the

administrative power of the officials of the roads as well as the service they render to the public?

"MR. ACWORTH. From the operating point of view, I do not think our railways have been sufficiently interfered with to prevent them developing the goodness of the service. But as to rate making, I have no doubt that the interference of Parliament, the courts, and the executive has all tended to stereotype and keep rates at an unnecessarily high level.

"THE CHAIRMAN. Would you say that, on the whole, the power to make rates generally and primarily should be left to the railroads and to the free play of the forces of the business world?

"MR. ACWORTH. Speaking as an individual student, I have no doubt that that is the process that will arrive at the best results for the community, with this exception: that I fully think it is necessary that the community in some way should interfere to protect all customers from unfair treatment.

"THE CHAIRMAN. You think that the power should reside somewhere to correct excessive and extortionate rates by summary and proper proceedings?

"MR. ACWORTH. I am not sure that I should go so far as to say excessive rates regarded as excessive in themselves. I am myself inclined to think that excessive rates will correct themselves. The wise men will discover that it does not pay to charge excessive rates. But I think the law should interfere to prevent unfair rates to A as compared with rates given to B. It seems to me that the state is bound to insist that the rates shall be public, and that practically will settle it, for if they are public they have got to be fair; I am inclined to think the law should confine itself to securing that, where there is a difference made as between A and B, the difference should be a difference for a commercial reason, and not for any reason of personal favoritism.

"THE CHAIRMAN. You have studied the railroad rates in the United States in comparison with foreign railroad rates, I take it. How do they compare as to charges for similar distances?

"MR. ACWORTH. I think we can beat you up to 20 or 30 miles. Then the best guess we can give is that our rates per ton per mile are three times yours.

. . . . . .

"SENATOR FORAKER. What is your opinion as to the general effect of prescribing these maximum rates?[1] Has it been beneficial to the shipper, or otherwise?

"MR. ACWORTH. I do not think, sir, the maxima have any importance whatever in relation to wholesale traffic. The only person they protect, if they do protect him, is if you or I want to send a few hundredweight

[1] The maximum rates are based on what the railroads had been charging in the past.

of some goods from one local station to another. That is the only case in which they apply.

"SENATOR FORAKER. In local business and on short hauls?

"MR. ACWORTH. Local business, short hauls, small quantities.

"SENATOR FORAKER. Where there is no competition, practically?

"MR. ACWORTH. Partly that, and partly where the traffic is expensive. I have no doubt in many cases the result of the maxima is that this expensive local business is done at a rate which does not represent a reasonable profit.

. . . . . .

"SENATOR CULLOM. Your judgment, as I understand you, is that whatever regulation you have had there has been of advantage to the country. I refer to regulation by Parliament in the passage of laws. Am I correct in stating that as your view?

"MR. ACWORTH. I do not think I put it as strong as that, sir. I say that I think it must be recognized that regulation is unavoidable — I would even say desirable; but I think a good deal of our regulation, and certainly the recent regulation preventing a railway from raising a rate when once it is lowered, is very much against public interest. I also think that the legislation in regard to undue preference in the degree to which the courts have carried it is against the public interest. It prevents the whole sale principle being applied where, on commercial grounds, it ought to be applied."[1]

Let us now turn to our own experience in this country with railway rate regulation, to see whether it follows the same lines of development as in England, from which our Interstate Commerce Act was so largely borrowed.

The Erie Canal was completed in 1825, and within about six months from that time the Legislature of the State of New York chartered a railway from Albany to Schenectady, one of the first railways chartered in this country. From that time on, the United States followed the lead of England in chartering and developing railways. They were small affairs, of very simple and cheap construction as to tracks and rolling stock. They were not then adapted to the economical movement of freight, because the engines and cars were so small and weak. In many cases the railroad was left free to fix its own tolls and charges; in other cases the common maximum was four cents per ton per mile for freight. In the beginning, the fact was recognized that these railways could not successfully compete with the water ways in the transportation

[1] Hearings before Committee on Interstate Commerce, pp. 1843 to 1870, especially pp. 1851–53, and 1856–58.

of freight. These railroads were not of sufficient length or magnitude to carry interstate freight. They were often of different gauges, for the express purpose of preventing the cars of one from being run over the tracks of another. The freight was carried to the end of a short line, removed from the cars, and placed on the cars of a connecting line, several times between cities no further apart than Buffalo and New York, the result being heavy and unnecessary terminal expenses for handling such freight. Naturally railway consolidations began to introduce economies, and to eliminate such unnecessary terminal expenses. As engines, cars, and roadbeds were improved, and such terminal expenses were eliminated, it was found that the railroads could compete with water carriers, especially canals and rivers, for much of the freight carried by them, and the result was that canals ceased to be built, and in this country, as in England, most of them began to decay. The fight of river steamship lines to prevent railways from bridging rivers like the Mississippi or the Ohio ultimately resulted in favor of the railways, because the railways had become so useful to the people that the people found them indispensable. As railways multiplied, however, competition between them became keen, and the natural result was secret agreements and rebates, often disastrous to localities and individuals. Railroad wars entailed railway losses, for which the railroads often sought to compensate themselves by high local charges. To prevent such unjust discrimination, soon after 1870, states like Wisconsin, Iowa, and Mississippi undertook to regulate the rates charged by railways within their borders, either directly or through railroad commissions, by the so-called "Granger" legislation. The railways appealed to the United States Supreme Court to test the constitutionality of such legislation, but they were uniformly told that the states had the lawful right to regulate charges of railroads within their boundaries, because the Constitution of the United States gave the courts of the United States no right to interfere with such regulation of intra-state rates, so long as it did not pass the inhibitions of the United States Constitution. At the October, 1876, term of the Supreme Court, several decisions were handed down sustaining this right of the states, upon the ground that the railroads' property was devoted to a public use and was, therefore, subject to rate regulation by the state authorities.[1]

[1] Grain elevators were held to be subject to legislation fixing their "maximum charge of storage." Munn *v.* Ill., 94 U. S. 113.

In the Railroad Commission cases,[1] the power of Mississippi to grant away the right to fix a limit upon railroad charges was denied, unless, at least, the words were stronger than those in the charter there involved, which gave the right to "regulate and receive tolls and charges." In so holding, however, the United States Supreme Court, about twenty years ago, first thus clearly stated the principle which has since become so important in the discussion of this whole subject:[2]

"The power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use, without just compensation, or without due process of law."

The principle laid down by Chief Justice Waite in the significant language just quoted, is all the more important because he also wrote the opinion in the Munn Case, and its associate cases, in 94 U. S. It was not immediately applied, however, in litigations, because a different principle laid down shortly before in the case of a ferry, promised the railroads, so often defeated, a different avenue for escape.

In Gibbons *v.* Ogden,[3] Chief Justice Marshall had said of the

---

In Chicago, etc., R. Co. *v.* Ia., 94 U. S. 155, the right of Iowa to classify railroads and fix "reasonable maximum rates" was upheld.

In Peik *v.* Chicago, etc., Ry. Co., 94 U. S 164, the right of Wisconsin to fix "maximum rates" was upheld, upon the theory that the sole question involved was "the power" of the legislature of Wisconsin so to do.

In Chicago, etc., R. Co. *v.* Ackley, 94 U. S. 179, it was held that the railroad could not recover more than the "maximum" fixed by Wisconsin, upon merely showing that the rate charged was "reasonable compensation"; but it will be noted there was no attempt to show what should have been shown, that the "maximum" was not "reasonable conpensation."

In Winona & St. Peter R. Co. *v.* Blake, 94 U. S. 180, it was held there was nothing in the railroad charter in that case "limiting the power of the state to limit the rates of charge."

In Stone *v.* Wisconsin, 94 U. S. 181, it was held that the charter did not prevent Wisconsin from fixing maximum charges, because the charter was under a state statute "subject to the reserve power of alteration or repeal," and the state court of Wisconsin having so decided, its decision was binding upon the United States Supreme Court.

[1] Stone *v.* F., L. & T. Co., and Stone *v.* Ill. C. R. Co., 116 U. S. 307, 347.

[2] Stone *v.* F., L. & T. Co., *supra*, at 331.

[3] 9 Wheat. (U. S.) 195, 196.

constitutional provision giving Congress the power to "regulate" interstate and foreign "commerce":

"The power of Congress, then, comprehends navigation within the limits of every state in the Union, so far as that navigation may be in any manner connected with" (such) "commerce. . . . It may of consequence pass the jurisdictional line of New York and act upon the very waters" (of the Hudson River).

This principle was applied to taxes of the State of Pennsylvania levied upon ferry boats plying between Gloucester and Philadelphia, in a case decided April 13, 1885.[1] In deciding that case, Field, J., said:

"The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged."

October 25, 1886, this significant language was applied to prevent the operation of the statute of Illinois, enacted in 1871 to regulate railway rates, from interfering with the charges of the Wabash Railway on a shipment of freight from the interior of Illinois to the city of New York.[2] In the powerful prevailing opinion of Justice Miller, he cites the last case, among others, and holds that the case was, in fact, controlled by the State Freight Tax Case,[3] where four years before it had been held that an act of Pennsylvania was void "as being in conflict with the commerce clause of the Constitution of the United States, which levied a tax upon all freight carried through the state by any railroad company, or into it from any other state, or out of it into any other state, and valid as to all freight the carriage of which was begun and ended within the limits of the state."

These decisions made it quite clear that the state regulations of railway charges were largely ineffective, because so large a part of the freight carried by railroads had come to be interstate commerce. Furthermore, the investigations of the Hepburn Committee,

[1] Gloucester Ferry Co. *v.* Pa., 114 U. S. 203, 204.
[2] Wabash Ry. Co. *v.* Ill., 118 Ill. 570.
[3] 15 Wall. (U. S.) 232.

and other committees, had made public the astonishing system of rebates then almost universal.[1] It became known, for instance, that a single customer of the Pennsylvania Railroad Company had received over eleven million dollars of rebates from that company in a single year. These rebates were not confined to rebates upon its own traffic, but covered the traffic of its competitors. How great a change has been wrought in the situation then existing by the Interstate Commerce Act subsequently enacted is apparent from the fact that the very railroad just mentioned, and its federated lines, now have a gross business of substantially $266,000,000.00 a year, and the very magnitude of that business would make any system of rebates unnecessary and impossible, even if the Interstate Commerce Statute had not been largely instrumental in abolishing such rebates. While some rebates are probably secretly paid by a few railroads, their aggregate amount is very small, and there is abundant testimony to the effect that the Pennsylvania Railroad Company then paid many times more rebates in a single year, to that single customer, than are now paid by all the railroads of the country put together.

The result of the decisions of the courts showing that Congress had the power to regulate interstate commerce, and the facts disclosed by a careful and statesmanlike report of the Senate Committee showing that Congress ought to exercise that power, was that Congress ended the fight begun by the states, by enacting the Interstate Commerce Act of February 4, 1887. That Act was not the result of a radical and uncontrolled impulse to strike at the railroads, but was the result of long-continued discussion and investigation, careful study of the legislation of England, and of adopting and adapting the English legislation, so far as possible.

At the time this report was made almost every railroad had its own system of classifying freight, and the result was great confusion and sometimes great difficulty in getting one railroad to forward the freight of another, because of the difference in classifications and in rates upon the same kind of freight upon different roads. Congress did not intend to give the Commission the power to make rates, or the power to make or change classifications. This distinctly appears from its report, in which it is said:

---

[1] So universal were these rebates, that Mr. Hadley quotes a witness before the Hepburn Committee as thus testifying:

"*Q.* Then the condition of getting the special rate is making the application? *A.* Yes, sir." Hadley, Railroad Transportation, 121.

"the difficulty encountered has been how to provide for or require uniformity, without specially prescribing the classification which shall be adopted, or without giving a commission authority to establish a classification, which would be equivalent to authorizing such commission to fix rates."

At the conclusion of the Committee's report, we find the intent of the Interstate Commerce Act thus tersely stated:

"The underlying purpose and aim of the measure is the prevention of these discriminations, both by declaring them unlawful, and by adding to the remedies now available for securing redress and enforcing punishment, and also by requiring the greatest practicable degree of publicity as to rates, financial operations, and methods of management of the carriers."

The Act makes "unlawful" charges not "reasonable and just"; forbids all kinds of "unjust discrimination" as to "contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions"; makes unlawful "undue or unreasonable preference or advantage to any particular person, . . . locality, or . . . traffic"; makes unlawful a larger charge for a shorter haul, unless authorized by the Commission after investigation; makes unlawful any "combination . . . for the pooling of freights . . ."; requires rates and charges to be made public, and not to be changed inside of ten days, upon published notice, and gives wholesale remedies, civil and criminal, by which the Commission and the courts can enforce its provisions against the roads, individually or collectively, as may be proper.

Amendment later being deemed necessary, Congress passed the Elkins Act of 1903, making the shipper and carrier alike criminals for either offering, soliciting, paying, or receiving rebates from "established" rates. In so doing the Commission and President were taken at their word that, thus amended, the law would substantially end all difficulties. The Elkins Law was well drawn, and it has done much, but, as shown, the main Act should be further amended to cover unjust charges and discriminations not now covered by it.

Beyond doubt, the public was disappointed to find that the original Act was not a panacea for all the complaints about the railroads to which they had so long listened in the disclosures and the discussions that preceded the Act. The first volume of the reports of the Commission is full of cases in which the Commission was called upon to investigate complaints of boards of

trade of cities like Boston and New Orleans, showing that the railroads were discriminating against them and thus depriving their merchants and citizens of the trade or the accommodations which they should enjoy. Almost without exception, these complaints proceeded on the theory that the cities and towns in question were entitled to enjoy the advantages which they had previously enjoyed, or that they were entitled to advantages they did not enjoy because on a mileage basis they should be treated more favorably than some rival city or town. The investigations of the Commission, and the experience and good sense of such strong men as the chairman of the Commission, the great jurist and author, Cooley, resulted in almost no change by the Commission, as the result of these investigations and complaints by cities and towns. The result was fierce public criticism of the Commission, which caused the chairman of the committee that passed the Act to make a public speech defending it, and bespeaking public patience, that the Commission, and the law under which it was acting, might be fairly tested before being condemned. It was soon found, however, that the provisions of the law for requiring the common carriers subject to the Act to file reports, contracts, schedules of rates, and like information, with the Commission, not only furnished the Commission with an accurate knowledge of what the various carriers were doing, but enabled the rivals of those carriers to ascertain, through the files of the Commission, what was being done. This publicity was expected to be, and has been from the beginning, of the greatest value in this country, as Mr. Acworth shows it was and is in England. Rival carriers, keen for every advantage, and able to scan each other's contracts, reports, and charges, are quick to complain, or to cause customers to complain, if a rival is caught violating the law. If a carrier finds it is losing the traffic of a given place, or a given customer, it knows that the rival carrier has either filed a lower rate or is secretly cutting the rate in violation of the law, and instantly the cut is met, or the carrier, or more frequently the Commission itself, is moved to make an inquiry touching the matter. Thus it comes about that in a very large proportion of the cases no complaint is ever filed, because publicity prevents violations of the Act, or exposes such violations, and thereafter causes the Act to be observed. In a large proportion of the cases where complaints are filed, the carrier complained of makes no contest, but the matter is speedily adjusted to the satisfaction of the complainant and the Commis-

sion. Where a contest is made, the matter involved is usually important, the railroad is advised by its experienced counsel that it is in the right, and the contest is, therefore, made to test the legal question involved. In a large proportion of the cases so contested, the railroads ultimately succeed, and the reports of the Commission, if adverse, are overthrown. This is not because the Commission has not been composed of able and fair-minded men, but because the very composition of it violates the well-known fundamental rule that the functions of an executive, a judge, and a legislator should never be combined in the same body.

The statistics of the cases that have come before the Commission and been tried out before them, and afterwards have been carried into the courts, forcibly sustain what has been said about its conflicting functions.[1] Its members are naturally zealous to sustain by report matters they have previously investigated, or to make a report to bring aid from the courts, if possible, where they have failed as an executive body in enforcing the law as they understand it. In short, the grand juror sits as a petit juror and finds the party he had indicted to be guilty; the district attorney sits as a judge and reaches a like conclusion; the governor, sitting as a judge, condemns the person who has made him trouble as a governor.

A brief examination of the decisions will show that our courts have followed the English courts in construing our statutes, as similar statutes have been construed in England. The act which was passed February 4, 1887, took effect upon the railroads sixty days later. Only about eighteen months from the time it took effect upon the railroads, two warring railroads had tried a case before the Commission, had refused to submit to its decision, and had fought out the case in court to ascertain the true construction of the Act. That case[2] thus answers the claim the Commission and others have since made, that in the beginning it was understood

---

[1] Mr. Joseph Nimmo, Jr., in a pamphlet on "Governmental Ownership, the Alternative of Governmental Rate Making," in 1905, stated that since 1887 the freight transactions had approximated three billion; the informal complaints filed with the Commission had been about 8000, the formal complaints 770, the formal complaints brought to a hearing 370, the formal complaints brought before the courts 45, and the number of cases in which the Commission had been sustained was one, and in another case it was partly sustained and partly overruled. The proportions still remain about the same; but the Commission has lately fared better in the Supreme Court.

[2] Kentucky, etc., Co. *v.* Louisville, etc., R. Co., 37 Fed. Rep. 567, 630, 633.

that it had the right to fix rates: "Neither is the Commission invested with authority to establish through rates, or to fix through rates between connecting lines."

Soon afterwards, Judge Jackson, who pronounced this decision, after a thorough review of the English and American authorities, erected a monument to himself by thus construing the Act in another case:[1]

"The act to regulate commerce does not undertake to deal with the subject of rates for transportation services, or with the business considerations which may influence common carriers in so adjusting them as fairly to increase their revenue, while paying due regard to the convenience of the public, any further than to declare the general principle that such rates shall be reasonable and just, shall be free from unjust discrimination, and shall confer no undue or unreasonable preference or advantage, nor impose any undue or unreasonable prejudice or disadvantage. Subject to these conditions and limitations, the act does not, and was not intended to, restrict the common-law right and power of common carriers to make special contracts, or adjust their rates with reference to existing wants and circumstances, so as to promote their own interests, while affording all proper and reasonable facilities and conveniences to the public. Subject to the above conditions, the act intended to leave the adjustment of rates as absolutely and completely in the discretion of the carrier as it existed at common law, which never questioned or denied to common carriers the right to give or make lower rates, based on increased quantity or amount of service."

These words have since been quoted again and again in the Supreme Court as furnishing the key to the true construction of the Act.

The decisions of the cases appealed from the Commission to the Supreme Court show how plain, simple, and long established are the legal rules applied to cases by our highest court. The key to the decisions is found in the words of the Statute that require rates "reasonable and just," that prohibit "unjust discrimination" or "undue advantage" under "similar circumstances and conditions." Always, the court stands for commercial liberty and free competition, a natural regulator of prices and rates. Unjust discrimination in favor of carriers that unlawfully become dealers, it strongly condemns and permanently enjoins by injunction under the Elkins Act, as it has just done in the Chesapeake & Ohio Coal Case. The great import, export, and domestic business of our

[1] I. C. C. *v.* Baltimore & Ohio R. Co., 43 Fed. Rep. 44, 48.

country is to be free as heretofore to develop upon natural lines, determined by geographical and market advantages, and personal ability in producer and carrier. The statute in England and this country alike is often called the "equality" law, and our Court so construes it as to give to producer, consumer, and carrier equality of opportunity, so far as that is practicable where personal abilities and natural and market advantages are unequal and continually changing. Above all things, it will not protect the railroads behind legal technicalities, where it is shown that they are violating the statute.

It will be seen, however, that the courts have never yet decided that the mere power to "regulate" interstate commerce gives power to fix all charges for service rendered in carrying it. This power to "regulate," after much consideration and two arguments, was held by the closest possible division of the Court to permit Congress to prohibit interstate commerce, or use of mails, in buying or selling lottery tickets. But this exercise of absolute sovereign power goes back to the police power, the right of self-preservation, the foundation of all government, the right to prohibit and exclude vice. The Court quoted with approval from a former decision:[1]

"Experience has shown that the common forms of gambling are comparatively innocuous, when placed in contrast with the widespread pestilence of lotteries."

But that decision is rested, too, upon the proposition, as stated by Marshall, C. J., in Gibbons *v.* Ogden, that by giving Congress the power to regulate interstate commerce, power was "vested in Congress as absolutely as it would be in a single government, having in its constitution *the same restrictions* on the exercise of the power, as are found in the Constitution of the United States."

But can either state or nation prohibit innocent business? What is "liberty" if men cannot do honest business? Grant that business that is mere vice can be prohibited in the exercise of the police power, can you hold that the power to prohibit all vice, in order to leave honest business a free field, gives the power to prohibit any innocent business? Can Congress make an eight hour labor law applicable to all interstate business, to "regulate" such business, or must our laborers have "liberty" to sell their only property, their "inalienable" right to labor, and to sell that labor? Grant

[1] Lottery Case, 188 U. S. 321, 356.

that the police power permits eight hour laws as to mining, or any dangerous business, where longer hours may undermine the health,[1] or as to municipalities, the creations of the state, and therefore subject to its regulation,[2] does it follow that the state may do more than prevent such unduly long hours of daily labor as shall endanger the health or lives of its citizens? The answer is plain. Our state legislatures have an almost unlimited power, unless their state constitutions otherwise provide, as generally they do not, to make state laws to tax; to create, classify, and punish crimes; and to regulate, or prohibit, all business, except interstate and foreign commerce. Such unlimited power is not possessed by Congress, because our state legislatures have sovereign powers, while Congress has only certain delegated powers. Yet even our states cannot "regulate" their state business by passing laws making the formation of an innocent business contract, or more than eight hours daily labor in a healthful business like baking, a crime, because the Fourteenth Amendment to the United States Constitution does not thus permit the "liberty" to do honest business to be taken from any man without "due process" of law.[3]

What, then, is the power of Congress over interstate commerce, and over common carriers, not created by Congress, as mere instrumentalities of that commerce? To regulate their rates of charge for services rendered, can it any more fix the very rate, the price the carrier shall charge, than it can what the laborer or the teamster shall charge for like service? Can it do so any more than it can fix the price of the eggs, cheese, hay, or grain of the farmer, if that becomes interstate commerce? Clearly, it can prohibit extortionate or excessive charges for service to interstate commerce, or for such articles of commerce. It can prohibit and make unlawful extortion or unjust discrimination; for each is an obstacle to, and a burden upon, interstate commerce. In the very language of the Constitution, as Senator Rayner and other Senators properly hold should be done, it may provide that all rates and charges shall return "just compensation" for the service rendered. "Just compensation" should be the statutory standard by which to measure these rates, as it is the standard of the Constitution and of the business world to measure the legality of all other

---

[1] Holden *v.* Hardy, 169 U. S. 366.
[2] Atkins *v.* Kansas, 191 U. S. 207.
[3] Allgeyer *v.* La., 165 U. S. 578; Lochner *v.* N. Y., 198 U. S. 45.

business transactions. But how much "compensation" does that mean the rate may contain? May it contain the cost of service, and some return to the owner, be that owner citizen or corporation, upon the fair value of the property used? In cases under state acts, where legislative power is limited only by the United States Constitution, we find the answer to these questions. We have seen that it was held, "the power to regulate is not the power to destroy."[1] The Court constantly harks back to this clearly stated principle, and holds the rate not only may, but must, give the owner some return upon his property. But this does not mean that water in the stock is value, or that stocks or bonds are necessarily property; so a return upon them need not necessarily be made.[2]

The courts, however, always have been, and are of right, vested with power to investigate the acts of all persons and commissions to see if they are making extortionate or unjust charges, or if they are interfering with the constitutional or property rights of a person or corporation. Therefore, no commission can be made a substitute for the courts "as an absolute finality," because so to provide would deny to a person "a judicial investigation by due process of law."[3]

The courts adhere to the principle that a state "legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates."[4] The question of when such rates are "reasonable" is "eminently a question for judicial investigation requiring the process of law for its determination. . . . The equal protection of the laws which, by the fourteenth amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public." So, corporate railroad rates fixed by a state commission were there condemned by the courts as "unreasonable and unjust," although the courts held they could not make rates to take the place of those there enjoined.[5]

But railroads or bridges may be so expensively built and so poorly located that just and reasonable rates will return no profit,

---

[1] Railroad Commission Cases, 116 U. S. 307, 331.
[2] Dow *v.* Beidelman, 125 U. S. 680.
[3] Chicago, etc., Ry. Co. *v.* Minn., 134 U. S. 418, 457.
[4] Chicago, etc., Ry. Co. *v.* Wellman, 143 U. S. 339, 344.
[5] Reagan *v.* F., L. & T. Co., 154 U. S. 362, 398–9.

and what can the courts do then? This question is unanswered, but the courts have said: [1] "It is unnecessary to decide, and we do not wish to be understood as laying down, as an absolute rule, that in every case a failure to produce some profit . . . is conclusive that the tariff" (made by the state) "is unjust and unreasonable."

What then, is the test? The Court answers: "We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction *must be the fair value of the property being used by it* for the convenience of the public." This would exclude water in stock or bonds; it might result in a value above or below cost, or stock and bonds combined. The Court says: [2]

"And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property."

The presumption is, however, that the rate fixed by the state is reasonable. It is for the party challenging it to overthrow it with clear proof. It is not enough to do this to show that the same rate upon a single commodity applied to "all" freight would result in insufficient revenue to pay expenses, because that particular rate may be profitable, and the thing to be shown is "that, at the rates fixed by the Commission, there would be no "profit, or an insufficient profit upon the coal so transported." [3]

From this review of the decisions, it will be seen the Court is ever ready to protect the individual from "unjust" rates, or the carrier from rates that do not return "compensation" for the service rendered.

The readiness of the Court to lend its aid to smash the most powerful combinations of railroads and corporations that capital, served by able lawyers, can devise, has been shown in U. S. *v.* Trans-Mo. Freight Ass.,[4] holding that even a valid contract between

[1] Covington T. Co. *v.* Sandford, 164 U. S. 578, 594.
[2] Smyth *v.* Ames, 169 U. S. 466.
[3] Minn. & St. L. R. *v.* Minn., 186 U. S. 257, 265.
[4] 166 U. S. 290.

railroads to regulate freights, is subject to the constitutional power of Congress to regulate interstate commerce, and therefore became illegal when the so-called "Anti-Trust Act" was passed in 1890.[1]

Does not this review of legal decisions of the Supreme Court show that that Court stands impartial between producers, consumers, and carriers, destroying combinations inimical to competition, destroying unjust practices and rates of carriers, resulting in unjust discrimination, and preserving competition where rates condemned by the Commission are the result of such competition? Is it not apparent from this review of the decisions that the Court can be depended upon to see to it that the liberty of the most humble laboring man to labor more than eight hours in a healthful calling shall not be interfered with, nor shall the liberty of the most powerful corporation to make honest contracts, or to receive just compensation for service, be illegally interfered with, even by state or national governments? Is it not apparent, however, that those who claim there has been illegal interference with their rights are required to make clear proof of such charges before the courts will interfere in their behalf? What reason, then, is there for the open attack upon this Court in 1896, or the silent and veiled attack upon it by ignoring it in the Hepburn Bill, for which some of the same leaders, among others, are responsible in the Senate now?

Furthermore, is it not clear that, so long as our courts remain, their doors cannot be legally shut upon suitors whose constitutional rights are invaded? The Constitution being the supreme law of the state as well as of the nation, and the Supreme Court of the United States being embedded in that Constitution as a part of it, and independent of all other branches of the Government, is it not evident that the Constitution itself is the real obstacle in the way of those who would ignore the courts in their attempts to "regulate" matters?

May Congress delegate to a commission the power to condemn regulations and practices of common carriers without fixing any

[1] Differently presented by a different combination of railroads, substantially the same question received the same answer. U. S. *v.* Joint Traffic Ass'n., 171 U. S. 505. A still more powerful combination behind a skillfully devised railroad stock-holding corporation called the Northern Securities Company, was compelled to yield to the same legal principle, in the Northern Security or Merger Case, 193 U. S. 197.

This principle has also been applied to combinations of manufacturers of iron pipe, although such business is essentially a private business. Addyston Pipe Co. *v.* U. S., 175 U. S. 211.

standard by which to test the lawfulness of such regulations and practices? This question is most important, because it involves the classification of more than eight thousand items of freight, and the rules and regulations governing its transportation. Undoubtedly, Congress may provide that any regulation or practice that shall work unjust discrimination, or undue preference, or any extortionate rate, shall be unlawful, and may be condemned by the Commission for that reason. No subject touched by the Hepburn Bill is of greater importance than this, and yet it has received but little attention in most of the discussions. Without going further into the authorities, it should be clear that Congress cannot delegate its power to a commission and permit it to fix its own standard by which to test a rate, a regulation, or a practice. Congress must declare what rates, regulations, and practices shall be unlawful, and must thus fix the standard by which the Commission shall test those questions. To the extent that the rates, regulations, or practices are innocent, they may not be condemned by Congress or the Commission, because "liberty," within the Constitution, means the right to do honest business through honest contracts, in any honest way. If Congress had created the carriers sought to be regulated, its power over them might be greater, because the creator of a corporation may regulate that corporation through the power of amending or repealing the legislation creating it. Here, however, Congress is dealing in almost every instance with state created corporations, which the courts have frequently declared are entitled to the same rights under the United States Constitution as a natural citizen doing like business, unless their charters otherwise provide.

But an important question most earnestly debated is whether Congress has the power to compel the courts to deny a temporary injunction to either citizen or corporation to protect constitutional rights, when it is claimed that they are violated, impaired, or destroyed by the action of the Commission. Is a temporary injunction "due process" to protect constitutional rights, within the Fifth and Fourteenth Amendments? A temporary injunction to protect legal rights, until a court of equity could finally hear and determine the case, was a well-known process of the courts of equity when the Amendments embedded "due process" into our Constitution to protect constitutional rights. Congress created the lower federal courts, and can confer jurisdiction, regulate procedure, and make rules of evidence for them; but can Congress

itself violate constitutional rights, or create a commission and give it power to violate them, and then order the federal courts to deny temporary injunctions to persons seeking such injunctions to protect such rights? May Congress say to parties who complain, "We have ordered a final hearing in the case expedited, that you may have the earliest possible day in court, so a temporary injunction is unnecessary"? Would that be a reasonable regulation of procedure as to injunctions? This question is a most important and a close one, and has never been squarely passed upon by our highest court. Congress cannot make a ruling of the Commission "final," [1] but can make its findings of fact *prima facie* evidence in the courts. This being so, may Congress also say, as a regulation of procedure in the courts, as a rule of evidence, that the findings of the Commission shall stand as evidence until some court finds otherwise after a trial upon the merits? Is a corporation denied a day in court if it is given the earliest possible day in court, ahead of all others, for a trial on the merits? Is that corporation denied a day in court, then, because it has not also had a preliminary day in court to get a temporary injunction? Because the temporary injunction cannot be got, it does not follow that the order of the Commission must be obeyed. On the contrary, it may be ignored until enforced by a court. The Commission has no more power to make a "final" decision impairing or destroying constitutional rights than a committee of Congress would have; nor can Congress delegate its power to such a commission unknown to the Constitution.[2]

Assuming that all the federal courts except the Supreme Court can be abolished by Congress because they were created by Congress, can Congress deny access to them while they remain in existence? And if Congress could deny access to them, or should abolish them, would the difficulty of the rate-makers who wish to evade constitutional rights be thereby removed?

It is true, perhaps, that suitors could not bring suits in the Supreme Court of the United States, but what is to prevent their going into the state courts and insisting that they have constitutional rights under the supreme law of the land which the state courts can and shall vindicate? Suppose the state courts should refuse to entertain the suits, or to vindicate such rights, and the

---

[1] Brimson *v.* I. C. C., 154 U. S. 447.

[2] Kilbourne *v.* Thompson, 103 U. S. 168.

suitor should carry his case from court to court until finally, by writ of error, he should bring it from the highest state court to the United States Supreme Court, what would be the result? Has not the Supreme Court of the United States reversed the highest state courts in a multitude of cases because they have refused to hear or to consider, or to yield to rights claimed under the United States Constitution? Upon what principle, then, would it be that the state courts could refuse suitors their rights under the United States Constitution because railroad rates are involved, and those rights are claimed in state courts, as other rights have been? If the state courts should deny suitors their constitutional rights under the United States Constitution, where such rights are claimed in them, what fair argument is there for urging that the United States Supreme Court would also be powerless to vindicate their rights under the Constitution which created the Supreme Court for the very purpose, among others, of vindicating violations of the Constitution?

Is it not apparent that in the last analysis we cannot escape the courts if we would, and we should not avoid them if we could? No cases of sufficient importance to be reviewed by them should fear their review. No just legislation should be afraid of their construction or enforcement. Courts are the very bulwarks of our liberties and our government, and if we cannot trust them, our institutions are a failure, and we may soon expect a strong man in the saddle to furnish us with something stronger, if not better.

Adelbert Moot.

BUFFALO, N. Y., April, 1906.